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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

EASTERN STATES PETROLEUM CORP.,
Petitioner,

v.

WILLIAM P. ROGERS, *Attorney General of the United States,*
GEORGE COCHRAN DOUB, *Asst. Attorney General, Civil Division,*
ROBERT B. ANDERSON, *Secretary of the Treasury,*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

and

RELATED PROCEDURAL MOTIONS

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EASTERN STATES PETROLEUM CORP.,

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WILLIAM P. ROGERS, Attorney General, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
and
RELATED PROCEDURAL MOTIONS

FORMAL PETITION

Eastern States Petroleum Corp. hereby petitions the Court to issue a writ of certiorari to the Court of Appeals for the District of Columbia Circuit and proceed to review its affirmance, — F. 2d — (May 12, 1960) of the jurisdictional dismissal by District Judge McGarraghy, sitting alone, 177 F. Supp. 944 (D. D. C. 1958), of a Complaint by your petitioner brought and pressed under 28 U.S.C. §§ 1331, 2282 and 2284.

Motion for Joint Consideration

This PETITION, seeking to invoke the Court's discretionary jurisdiction,[1] has been filed as a precautionary supplement to Eastern States' primary effort to invoke the Court's obligatory jurisdiction pursuant to 28 U.S.C. §§ 1253 and 2282. That primary effort currently takes the form of a MOTION, filed 24 June 1960, seeking reinstatement of our direct appeal from the District Court dismissal; *viz.*, Appeal No. 70, Oct. Term, 1959, which was dismissed by this Court, without specification of grounds, on October 12, 1959. See 361 U. S. 7. Eastern States hereby moves the Court to undertake concurrent consideration of this PETITION and that MOTION. *Cf.* R.R. 23(5) and 43(5). *Cf. Stainback* v. *Mo Hock Ke Lok Po.*, 336 U. S. 368, 380-1 (1949).

Justification for Abbreviated Form of this Petition

The printed documents filed in the companion Appeal, *supra*, supply the Court with most of the data concerning this case which a wholly independent petition would have to supply pursuant to R.R. 23(1). In this circumstance, and in light of R.R. 23(4) and 23(5), petitioner has not burdened this PETITION with a repetitious printing of material supplied in documents previously filed in this

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1. Eastern States' previous effort to invoke the discretionary jurisdiction of the Court took the form of a Motion for leave to file a PETITION FOR WRITS OF MANDAMUS directing Chief Judge Prettyman or District Judge McGarraghy to convene a three judge court. See Misc. No. 34, October Term, 1959. This Court's order denying that Motion was entered on October 12, 1959. See *Eastern States Petroleum Corp.* v. *Prettyman*, 361 U. S. 805.

Chief Judge Prettyman's opinion, denying our application to him, under 28 U.S.C. 2284(1), for the convening of a full court of three judges to hear a Motion under 2284(5) for review of the single judge's action, is reported at 105 U. S. App. D. C. 219, 265 F. 2d 593 (1959).

Court, using citation-references to those documents instead. *Cf.* 28 U.S.C. § 2103 directing this Court to consider papers filed in a misconceived appeal under § 1257 as a petition for certiorari.

Prior Opinions

The opinions below, cited above, are printed in appendices to the JURISDICTIONAL STATEMENT and the MOTION TO RECALL THE JUDGMENT AND REINSTATE THE APPEAL in Appeal No. 70, *supra*.

The previous orders of this Court, cited above, are printed on page C-1 of the JOINT APPENDIX in the Court of Appeals, filed with this PETITION.

Jurisdiction

This petition invokes this Court's jurisdiction, under 28 U.S.C. § 1254(1), to review judgments in cases in the Courts of Appeals. The judgment of the Court of Appeals was originally filed on 12 May 1960 and became final on 7 June 1960 when the Court denied our petition for a rehearing *en banc*. The appeal to the Court of Appeals, under 28 U.S.C. § 1291, was pressed, within the extended time allowed,[2] after this Court denied direct review by its orders of October 12, 1959, cited above. The jurisdiction of the District Court under Section 1331 over Constitutional actions, despite 28 U.S.C. § 1583 on which the dismissal below was grounded, is one of the Questions Presented, *infra*.

Questions Presented

The opinion of the Court of Appeals has given prominence to certain subsidiary questions comprised by the set of inclusively-formulated questions presented to that Court

2. See JOINT APPENDIX at vii and A52.

by Eastern States after this Court declined to entertain them. And the showing of Reasons For Granting The Writ, *infra*, includes discussion of the public importance of those subsidiary questions given prominence by the Court of Appeals. But, the moves, contentions and rulings of record in this case still serve to raise the inclusive questions originally presented to both courts. And our MOTION to reinstate our appeal retenders those inclusive questions to this Court. Thus we have decided that all those inclusive questions should also be tendered in this PETITION by a reference over to pages 7-9 of the JURISDICTIONAL STATEMENT, praying here, however, that the Court entertain those whole or subsidiary and separable questions which are judged worthy of discretionary attention.

Statutes Involved

The Statutes directly and immediately involved were reprinted in the JURISDICTIONAL STATEMENT at 5-7. Other pertinent statutes were reprinted in the JOINT APPENDIX in the Court of Appeals at B1 to B44 as well as in Appendix B of our PETITION FOR WRITS OF MANDAMUS, *supra*.[3]

Statement of the Case

Previous references in this PETITION, to intervening appellate events supply all that need be added here to the "Statement of the Case" set forth in the JURISDICTIONAL STATEMENT at 9-17.

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3. The Twenty-five copies of the JOINT APPENDIX filed in the Court of Appeals were made up by recovering extra copies of the comprehensive Appendices to our PETITION FOR WRITS OF MANDAMUS, adding only four newly printed pages presenting this Court's orders and the docket entries in the District Court. This circumstance has lead us to accompany this PETITION with a MOTION, printed hereafter, for use of the copies of the Appendices to our PETITION FOR WRITS OF MANDAMUS, already filed, as the basic printed record in this proceeding or in our Appeal, if it is entertained.

REASONS FOR GRANTING THE WRIT

I. The Court's ordinary discretion to decline to hear claims presented by petitions for certiorari has been held to be inoperative with respect to a claim like petitioner's.

This Court's ordinary freedom to decline to entertain petitions addressed to its discretionary jurisdiction has been held to be inoperative where, as here, the proposed proceeding must be entertained if the process rights of a plaintiff, who is entitled *by Congressional Act* to have a Constitutional claim for an injunction heard and determined by a three judge District Court subject to review, of right, by this Court, are to be secured. Recognition of this extraordinary "legal right" to a favorable exercise of ordinarily "discretionary jurisdiction" came in the very first decision of this Court under the famous three judge-direct appeal statute of 1910, 36 Stat. 557, Judicial Code (1911) § 266. See *Ex parte Metropolitan Water Co.*, 220 U. S. 539 (1911), a unanimous opinion by Chief Justice White holding this Court obligated to grant mandamus relief from a single judge's refusal to convene a three-judge court to hear Constitutional contentions he judged to be "untenable", despite the respondent's contention that a "direct appeal" would be the proper form-of-proceeding and his strong showing that petitioner did not deserve a favorable exercise of discretion. (This landmark case is quoted and discussed at length in the JURISDICTIONAL STATEMENT at 17 n. 6 and 27-9.)

Subsequent reforms, tightening up the distinction between the discretionary and the obligatory jurisdiction of this Court have, of course, sought to cast *every* resort to this court which is "of right" into the form of "appeals",

authorized by statute, filed here by a would-be appellant without need to obtain an order "allowing" the appeal. Compatibly with that movement, Eastern States has urged that Sections 1253, 2282 and 2284 merit a construction that will currently secure the statutory privilege to be heard in this Court, of right, on a claim for relief from a single judge refusal to convene a three judge court, which was recognized in *Metropolitan Water, supra*, by a modern holding on proper form-of-proceeding *i.e.*, by recognizing a right to "appeal" to this Court under Section 1253 from (a) the final disposition by a full court of three judges of a motion under Subsection 2284(5) for review of a single Judge's dismissal of a complaint claimed to require three judge-direct appeal determination, or (b) from the single judge's dismissal, such a direct appeal to be kept in abeyance pending disposition of an alternative appeal to the Court of Appeals under Section 1291 when the type of claim asserted by such alternative appeals has not previously been held to be directly entertainable hereunder Section 1253. If the Court concludes against our "appeal" contentions and refuses to reinstate our Appeal, then the Court will be legally obligated by the reasoning and holding in *Metropolitan Water, supra*, to recognize an exceptional compulsion to grant a writ and proceed to hear Eastern States' claim. No other remedy will remain available to secure Eastern States' statutory privilege to have its Constitutional claim finally determined by this Court.

II. The questions and subquestions presented by this petition are of a character, in terms of importance and ripeness, such as to warrant their resolution by this Court. Indeed, on Question II there is an inter-circuit conflict, and on Question I there is some divergence of opinion.

Question I: The currently proper form(s)-of-proceeding for relief from single judge dismissals of actions claimed to require three judge-direct appeal determination.

The comprehensive set of *moves* made by Eastern States in its effort to secure relief from the single judge dismissal of its Complaint which it claimed required three-judge-direct appeal processing, the *grounds* of respondents' opposing moves, and the responsive *rulings* of Chief Judge Prettyman, this Court, and the Court of Appeals further confuse the question of the form(s) of proceeding by which such relief is currently to be sought. As shown in our previous documents, the leading text-writers still treat the *Stratton*[4] holding, *requiring* direct Petitions for mandamus, as authoritative, the Courts of Appeals divide in their degree of allegiance to *Stratton's* preclusion of their appellate jurisdiction, and this Court's orders are inconclusive concerning the *current* propriety of either direct petitions or direct appeals. See our JURISDICTIONAL STATEMENT at 2-5 and 18-36, our BRIEF IN OPPOSITION TO APPELLANT'S MOTION at 2-6, and our MOTION TO REINSTATE THE APPEAL at 6-9. See also our PETITION FOR WRITS OF MANDAMUS at 18-20.

The question over currently proper procedure for reviewing refusals to convene three judge courts has arisen, and will arise, repeatedly. And, until present

4. *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10 (1930).

confusion is resolved by an authoritative opinion from this Court, the multiplicity of alternative moves and contentions that cautious counsel presently have to make will continue to waste the energy and time of the judicial establishment and to tax or exhaust litigants of moderate means. The moves, arguments and rulings in this case would seem to have raised and illuminated the whole question to a point where it is clearly ripe for a present decision which will prevent further waste.

Question II: The impact of subsequent legislation on single judge authority over complaints asserting claims described in three judge-direct appeal statutes.

1. The restrictive construction of the prohibition in 28 U.S.C. § 2284(5) against single judge dismissals of injunction-claims described in 28 U.S.C. § 2282, announced by the Courts below, following *Jacobs* v. *Tawes*, 250 F. 2d 611 (4th Cir. 1957), is in direct conflict with the straightforward construction of § 2284(5) in the alternative holding of *Snyder's Drug Stores* v. *Taylor*, 227 F. 2d 163, 165 (8th Cir. 1955), cited to the Courts below but ignored in their opinions. See also *Aaron* v. *Cooper*, 261 F. 2d 97, 105 (8th Cir. 1958); (the matter of single judge authority to decide whether a claim is or is not of a type described in Sections 2281 or 2282, also present in *Aaron*, is not a real issue in this case. See PETITION FOR WRITS OF MANDAMUS at 45-6).

2. The rule for construction which was employed in *Jacobs* v. *Tawes*, *supra*, and so influenced the decisions below, is more restrictive of the operation of Sections 2282, 2284 and 1253 than the rule for construction of three-judge-direct appeal statutes adhered to by this Court in *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, 140-144 n. 6; and see *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 84-5 (1960).

3. The Court of Appeal's construction of Section 2284 and of its predecessor the Act of April 6, 1942, 56 Stat. 99, 28 U.S.C. § 792 (1946 ed.) combine to yield a resolution by that Court of an important question of three judge-direct appeal jurisdiction, involving the impact of subsequent Congressional Acts on this Court's holding in *Ex parte Poresky*, 290 U. S. 30 (1935), which warrants and is ripe for resolution by this Court.

(a) Over the many years since their enactment this court has never considered the impact on its aforecited holding of the prohibitions of single judge dismissals enacted in the Act of April 6, 1942, *supra*, or in 28 U.S.C. §§ 2282 and 2284 (1948).

(b) The question whether the (clear, though evadable) language of the Congressional Acts aforecited was effective to supercede this Court's aforecited holdings can be freely resolved, without any still felt conflict of duties, only by this Court. *Cf. Gayle* v. *Browder*, 142 F. Supp. 707, 716-7 and 717-21 (M.D. Ala. 1956)(2-1) *aff'd* (without discussion of the disagreement below over the lower court's proper role in effecting legal change) 352 U. S. 903 (1956). Compare Note, *The Attitude of Lower Courts To Changing Precedents*, 50 YALE L. J. 1448 (1941).

(c) The rulings in the lower courts, sustaining the continued existence of single judge authority to dismiss three judge claims for lack of District Court jurisdiction, all ignore the expressions of independent scholarly opinion *to the contrary* published after the new Acts. These expressions were cited to the courts below,[5] but ignored in their opinions.

5. See also PETITION FOR WRITS OF MANDAMUS at 77-8.

(d) The opinion of the Court of Appeals below, the only opinion which has discussed the pertinent legislative history, characterized it as providing only "shreds" of support for a reading of the legislation which would supercede *Poresky*, *supra*.

But the "Report of the Committee on Federal Legislation of the Bar Association of the City of New York," the main material invoked by Eastern States, recommended passage of the Kefauver Bill, H.R. 4812, 77th Cong. 2nd. Sess. (1942), (which became Section 3 of the Act of 1942), on an *expressed* ground that its passage would over-rule *Poresky*. That Report was filed with the House Committee, which conducted the only hearing, by the sponsor of the Bill, without objection. Moreover, that Bar Report was expressly invoked by the Committee in support of its recommendation, [H.R. REP. No. 1677, 77th Cong., 2nd. Sess. (1942)], that the bill be passed, as amended to accomplish other objectives. See BRIEF IN OPPOSITION TO APPELLEES' MOTION at 8 n. 22; and see PETITION FOR WRITS OF MANDAMUS at 58-68.

Given these legislative facts, prevalent practice in reading materials of legislative history precludes the conclusion, concerning the view of the New York Bar that the Bill would effect a *desirable* "over-ruling" of *Poresky*, which was voiced below in note 12 of the opinion of the Court of Appeals: "But, there is *no indication* that any member or committee of Congress embraced this suggestion or anticipated such a result". (Emphasis supplied.) Such a reading of legislative history constitutes such an extreme departure from usual practices as to warrant supervisory review.

Question III: The impact of 28 U.S.C. § 1583 (1948) on District Court jurisdiction over actions arising under the Constitution.

1. The holding below, that the 1948 addition in Section 1583 of the provision vesting the Customs Courts with *exclusive* jurisdiction over "protest proceedings" implicitly divested the District Courts of jurisdiction over "actions arising under the Constitution" which challenge customs-revenue laws, warrants review on several grounds:

(a) This holding in favor of an *implicit* restriction of District Court jurisdiction over Constitutional actions was reached, despite the simultaneous incorporation in 28 U.S.C. § 1340 (1948) of an *expressed* restriction of District Court jurisdiction over "actions arising under customs-revenue laws". This implicit restriction of District Court jurisdiction under 1331 was justified on the basis of a "clear purpose" of Congress, which was asserted by the Court of Appeals but which was not, and can not be, documented in light of the REVISER'S NOTES and his differential treatment of Sections 1331 and 1340.[6] Thus

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6. Collateral support for the greatest scepticism that Congress intended to deny importer-taxpayers *any* resort of right to *any* Art. III court, even before any ultimately final rejection of a substantial claim of substantive *Constitutional* right, is afforded by the liberality of Congress in providing other taxpayers access, even for *subconstitutional* claims, not only to the Court of Appeals for review of Tax Court discussions, but alternative access to the District Courts for refund actions, as well. Indeed, a contrary conclusion with respect to Congressional intent could precipitate a serious question of Unconstitutional discrimination among litigant-taxpayers. *Cf. Griffin* v. *Illinois*, 351 U. S. 12 (1956). Despite the distinct Congressional contributions to remedial law under the *internal* and the *customs* revenue laws, when deliberating very basic remedial questions, this Court has not been unwilling to draw inferences from comparisons of the remedial opportunities in the two fields. See *Flora* v. *United States*, 362 U. S. 145, 153-155 (1960); and see 185-188 (dissenting opinion).

the holding below constitutes a noteworthy departure from this Court's holdings against statutory constructions which effect *implicit* restrictions of District Court jurisdiction, particularly over Constitutional actions, when such a consequence is not clearly implied by the statute being construed. See *Harmon* v. *Brucker*, 355 U. S. 579, 580-2 (1958); *Leedom* v. *Kyne*, 358 U. S. 184, 187 (1958); *Brownell* v. *Tom We-Shung*, 352 U. S. 180, 182-5 (1956); and see the cases marshalled in Mr. Justice Brandeis' dissent, from the even broader rule of construction pursued by the majority, in *Crowell* v. *Benson*, 285 U. S. 22, 65 at 89-91 (1932) (dissenting opinion). Compare *Estep* v. *United States*, 327 U. S. 114, 119-121 (1946). *Cf. Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297 (1943) and *Schilling* v. *Rogers*, 363 U. S. 666 (1960) where there was a strong showing from legislative history in favor of preclusion and where the precluded claim was not grounded on substantial Constitutional contentions. Compare *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950) *reversing*, *Eisentrager* v. *Forrestal*, 174 F. 2d 961 (D. C. Cir. 1949), where the merits of the alien's Constitutional claim were assessed and rejected by this Court before its dismissal was approved.

2. By foresaking an accommodating construction of Sections 1331 and 1583 (formulated in terms of primary jurisdiction, exhaustion and ripeness), in favor of a denial of jurisdiction itself, the holdings below constitute a serious departure from this Court's holdings against statutory constructions which raise serious Constitutional questions of Due Process, like Question V, *infra*, that could have been avoided by a construction of Section 1583 that would implement the clear aims of Sections 1583 and 1340 without very questionably restricting the jurisdic-

tion of the District Courts under Section 1331 over Constitutional actions. See *Harmon* v. *Brucker*, 355 U. S. 579 (1958); *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922); *Crowell* v. *Benson*, 285 U. S. 22 (1932); *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38 (1936). Compare *Georgia R. R. & Banking Co.* v. *Redwine*, 342 U. S. 299 (1952). *Cf. Lipke* v. *Lederer*, 259 U. S. 557 (1922); *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498 (1932). And see *Lockerty* v. *Phillips*, 319 U. S. 182, 188-9 (1943); *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752 (1947) and *Lichter* v. *United States*, 334 U. S. 742 (1948). *Cf. Johnson* v. *Eisentrager*, *supra*.

See also *Horton* v. *Humphrey*, 352 U. S. 921 (1956), analyzed in our JURISDICTIONAL STATEMENT at 42-5, further considered in subpoint (2) of the next Question.

Question IV: Does any remedial doctrine preclude present exercise by the District Court of jurisdiction over Eastern States' complaint.

1. The alternative holding of the Court of Appeals that plaintiff's remedial allegations, showing that the exercise of primary jurisdiction over companion cases had yielded resulting decisions which not only *reached* but *terminally rejected* its *Constitutional* contention, did not satisfy the requisites of "equitable relief", articulated in terms of "extreme hardship", imposes more stringent restrictions on equitable relief in the federal courts, particularly to secure Constitutional rights, than the remedial doctrines now or heretofore, espoused by this Court will permit.

(a) Most directly in point, see *Morey* v. *Doud*, 354 U. S. 457, 460 n. 3 and 470 n. 16 (1957) as contrasted with *Doud* v. *Hodge*, 350 U. S. 485 (1956). See also *Aircraft & Diesel Equip. Corp.* v. *Hirsch*, 331 U. S. 752, 764, 773-4 (1947).

Cf. Alabama Public Service Comm'n v. *Southern Ry.*, 341 U. S. 341, 348-9, (1951) where this Court justified a *permanent* bar to *exercise* of the jurisdiction of a District Court of three judges, pursuant to Section 2281 and both constitutional question and diversity jurisdiction, by noting the complainant's alternative *right*, after exhaustion of the administrative and judicial processes of the state, to an ultimate hearing, in this Court, of right, if its federal constitution objections has been reached but rejected. Compare Note, *Consequences of Abstention by A Federal Court*, 73 HARV. L. REV. 1358, 1365-8 (1960) discussing resort back to a District Court, and lifting of res judicata, when resort to this Court from the primary jurisdiction is not of right. *Cf. Angel* v. *Bullington*, 330 U. S. 183, 189-90 (1947) (res judicata is a bar to District Court adjudication where prior opportunity for resort to this Court, of right, was not pursued).

(b) "And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution. * * *" See *Bell* v. *Hood*, 327 U. S. 678, 684 (1946).

The long run trend toward recognition of the ordinary propriety of injunctive relief to secure a constitutional right so long as the particular controversy presented for adjudication is "ripe", regardless of other opportunities for federal court relief by way of damages (or other formerly "legal" remedies), was accelerated by the provision of the declaratory judgments legislation to the effect that declaratory relief is proper "whether or not further relief is or could be sought". 28 U.S.C.A. § 2201 (Supp. 1959). Among the opinions of this Court which have given most overt expression to a doctrine that injunctions to secure constitutional rights are *now* remedially proper,

unless some *presently purposeful* remedial rule dictates against such relief, are *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 166 n. 12 (1958); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). Compare *Public Utilities Commission of California* v. *United States*, 355 U. S. 534 (1958). *Cf. Brownell* v. *Tom We Shung*, 352 U. S. 180 (1956).

One still purposeful remedial rule barring injunctions does operate *near* to, but *not upon*, this action, *viz.*, the Congressional bar to "suits restraining the assessment or collection of any tax". 26 U.S.C.A. §7421. Petitioner's actions falls outside Section 7421 because the taxes against petitioner were assessed and collected long ago.

(c) If petitioner must still bring its Complaint within the precedents which declare what constitutes an "inadequate remedy at law" and "irreparable injury", petitioner can. The present showing of the probable non-recognition of plaintiff's substantive constitutional rights in the Customs Courts must be judged, on precedent, as satisfying the demands of "inadequate remedy" and "irreparable injury" as they have been applied in this customs field unless *Waite* v. *Maca*, 246 U. S. 606 (1918) is to be completely repudiated. Moreover, an importer is not allowed interest on returns of duties that are held to have been erroneously taken from him under protest, while *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 778 note 32 (1947) suggest that the lack of such a right to interest in similar circumstances would have constituted "irreparable injury".

(d) Finally, the holdings or dicta in the cases which permit exercise of District Court jurisdiction over all or part of Constitutionally grounded actions for injunctions *without exhaustion* of a primary jurisdiction elsewhere,

lend collateral support for equitable relief in a case like this where there has been exhaustion in companion cases. Thus, see *Lichter* v. *United States*, 334 U. S. 742 (1948); see also *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 85-6 (1960); and see *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535 (1954) where the tendered showing of satisfaction of customary injunction requirements was the basis on which the plaintiff tried to justify the *failure* to *exhaust* the primary jurisdiction. This Court found that showing to be *inadequate*; yet, the Court exercised jurisdiction over some of the issues which did not qualify for postponement under primary jurisdiction. *Cf. Lockerty* v. *Phillips*, 319 U. S. 182, 188-9 (1943).

2. This Court's memorandum decision in *Horton* v. *Humphrey*, 352 U. S. 921 (1956) *affirming* 146 F. Supp. 819 (D. D. C. 1956) (3 judge court) was cited throughout this case by the Department of Justice as standing for the proposition, (adhered to by the District Court in this case), that the District Courts lack jurisdiction over the subject matter of actions arising under the Constitution which concern customs matters. The Court of Appeals cited the case for the proposition, alternatively espoused by the District Court in that case, that "The Customs Courts provide an 'adequate remedy' except in cases of 'extreme hardship'." (Internal quotation marks supplied.) Petitioner has read this Court's memorandum affirmance as implicitly grounded on an acceptance of Humphrey's argument to this Court, (in his MOTION TO AFFIRM at 6-7) that the jurisdictional dismissal below was proper *on the alternative ground* that Horton's failure to resort to and exhaust the primary jurisdiction of the customs courts was not justified by his mere assertion of Constitutional grounds for relief. Compare *Lockerty* v. *Phillips*, *supra*.

Only this Court can resolve the continuing confusion generated by its memorandum decision in *Horton*. And, it is time again, after decades of silence, because of the "exclusiveness" provision that *was* added to the Customs Court's jurisdictional statute, by the 1948 revision, in Section 1583, for this Court to provide the profession with a new full opinion on the now proper relations under present statutes between the jurisdiction of the Customs Courts over *proceedings for review* of protested decisions of Customs Collectors and District Court jurisdiction over *actions arising under the Constitution* which assert claims for injunctive relief against threatened enforcement of customs statutes on their face or as construed. *Compare* 28 U.S.C. § 1331 *with* 28 U.S.C. § 1340.

3. Finally, the relation of this question, concerning the proper adjustment of Sections 1331, 1340 and 1583, to similar questions over arguably complete preclusions of access to Art. III courts by "exclusive" remedy proceedings in other forums expands "the public" to whom this Court's plenary disposition of the present question will be important far beyond the "public" that is concerned with customs administration.

Question V: The rights to be heard guaranteed by Article III and Due Process to persons who assert ripe and substantial claims of substantive or primary constitutional right.

The Court of Appeals reached, but rejected, petitioner's contention that persons who assert ripe and substantial claims of substantive or primary Constitutional right enjoy implementing rights, under Article III and the Due Process clause of the Vth Amendment, to be heard of right in *some* Art. III Court, trial or appellate, before

ultimately final abridgments of those basic Constitutional rights. This Constitutional decision qualifies for plenary *consideration* by this Court, (even though it may be *avoided* here by reconstruction of Sections 1331 and 1583), as an important departure from the controlling decisions of this Court. Or, if the question decided below be judged distinguishable from those heretofore resolved by the decisions of this Court, then review is in order because the decision below resolves closely related questions which are ripe for, and important enough to merit, consideration by this Court.

1(a) The process right asserted by petitioner, and rejected by the Court of Appeals, is narrower and concedes greater Congressional control over rights to judicial process, through its control over court jurisdiction, than did the Constitutional rights to be heard in Art. III courts that were recognized or presupposed by a great wealth of decisions cited in our JURISDICTIONAL STATEMENT at 51-2[7]; they run from *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 347-9, 380-2 (14 U. S. 1816) and *Cohens* v. *Virginia*, 6 Wheat. 264, 383-4, 387, 388, 391, 402-4 (19 U. S. 1821) through *Crowell* v. *Benson*, 285 U. S. 22, 60, 86-8 (1932) and *O'Donoughue* v. *United States*, 289 U. S. 516, 539-40 (1933) to *United States ex rel Toth* v. *Quarles*, 350 U. S. 11, 13-19, 31 (1955).

Even Mr. Justice Brandeis' famous opinion, *rejecting* the broad "fact-issue" scope of the rights to be heard on Constitutional claims that were recognized by the majority in *Crowell* v. *Benson*, *supra*, does not deny that rights to "judicial process" for the final resolution of "legal

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7. To the secondary material also cited there should now be added Hart, *Foreword: "The Supreme Court, 1958 Term"*, 73 HARV. L. REV. 84, 106-107 n. 65 (1959).

issues" in *Constitutional claims*, that *are* secured to people by the Constitution, can preclude Congressional power to subject controversies "to the conclusive determination of administrative bodies or federal legislative courts." See 285 U. S. *at* 87. See also his concurring opinion in *St. Joseph's Stock Yards Co.* v. *United States*, 298 U. S. 38, 77, 84 (1936).

1(b) Decisions like *Cary* v. *Curtis*, 3 How. 236 (44 U. S. 1845), *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (59 U. S. 1856) and *Ex parte McCardle*, 7 Wall 506 (74 U. S. 1869), while frequently over-read as constituting a competing line of authority, are really distinguishable. Rejecting claims of rights to be heard in some one of the Art. III Courts, these decisions acknowledge that Congress enjoys control under the Constitution over the jurisdiction of each type of Art. III Court, considered separately. They do not dispose of the more serious question of when, if ever, those lines of Congressional authority can be *simultaneously exercised* so as to completely deny a hearing on the merits of a substantive Constitutional claim in *any* Art. III Court.[8] Compare *Lichter* v. *United States*, 334 U. S. 742, 793 (1948) (refusing, on exhaustion ground, to decide tendered question re preclusion from Art. III courts of *subconstitutional claims*) *Cf. Aircraft & Diesel Equipment Corp.*, 331 U. S. 752, 775-6 (1947) (Construing away apparently complete preclusion of *Constitutional* claim). Compare *Lockerty* v. *Phillips*, 319 U. S. 182, 188-9 (1943) remembering that the specialized court there, the Emergency Court of Appeals, was manned by Article III judges.

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8. Indeed, the conclusion in favor of Congressional preclusion of District Court jurisdiction in *Cary* v. *Curtis*, *supra*, was accompanied by a reminder of the availability of state court jurisdiction with a resort to this Court, of right, thereafter, not afforded if such controversies were to be *tried* in the federal courts.

1(c) Petitioner distinguishes *Burns* v. *Wilson*, 346 U. S. 137 (1953) *rehearing denied*, with dissenting opinion, 346 U. S. 844 (1953) on the bases of the nature of the Constitutional claim there, *viz.* proper adjudicatory procedure, when viewed in the light of the common law tradition against review of proceedings in one adjudicatory tribunal by another, except as specially authorized by statute. We distinguish, on similar grounds, the dicta in *Brown* v. *Allen*, 344 U. S. 443, 448 *at* 499 (1953) about Congressional authority to leave "the enforcement of federal constitutional rights governing the *administration* of criminal justice in the States exclusively to the State Courts." (Emphasis supplied). With regard to basic claims against the Constitutionality of penal statutes of the States, *Cohens* v. *Virginia*, *supra*, recognized a Constitutional right of resort to the only available Art. III Court, by an unprecedented type of writ of error to review a penal judgment. Compare *Kinsella* v. *Singleton*, 361 U. S. 234, 236 (1960) with *Burns* v. *Wilson*, *supra*.

1(d) The Court of Appeals drew prime support for its rejection of the constitutional right to be heard which petitioner has claimed from *Ricomini* v. *United States*, 69 F. 2d 480, 483-4 (9th Cir. 1934). If the reasoning in *Ricomini* really did justify the holding below, then it would be incompatible with this Court's precedents aforecited and would merit restriction. But the right to sue in a District Court for a refund of an allegedly Unconstitutional exaction that was claimed, and denied, in *Ricomini* was clearly different, in its legal grounding and in its disruptive implications for customs administration, from the narrow right to be heard in an Art. III Court, when all primary remedies have been unsuccessfully exhausted, that is asserted and documented by petitioner.

1(c) Summarizing the pertinent precedents, the critical emphasis in the *Toth* case, *supra*, on the *process rights* secured *to people* by Art. III *and* the Bill of Rights makes clear that the holdings on the Constitution's allocations of power within and among our governments over adjudicatory jurisdiction are to be read so as to afford *ultimate* supremacy to the process rights which the people secured to themselves in that Document and Its Amendments. Compare Mr. Justice Johnson's concurring opinion in *Martin v. Hunter's Lessee*, *supra*. See 1 Wheat. at 380-2.

2. The Court of Appeals supplemented its reliance on the *Ricomini* case, *supra*, by a line of reasoning as follows, (bracketed material and emphasis added; footnotes omitted);

> "* * * And even in cases where an adverse decision of the customs courts involving [substantive] constitutional questions stands unreviewed [because the Supreme Court denies certiorari], we do not think the tax payer is denied due process [because he is afforded no opportunity thereafter, nor before, to be heard in any District Court or in any other Art. III court]. In our view, the distinctions between the customs courts and the District Courts [or other Art. III courts] do not rise to a level at which it may be said that *final* [adverse] adjudication of [substantive] constitutional questions in the customs courts offends the requirements of [Art. III *and*] due process. Judges of the customs courts, like judges of Article III courts, are appointed [to their permanently specialized judgeships] by the President, with the advice and consent [to *these* appointments] of the Senate, and serve during good behavior. [Among others' functions] Customs courts entertain "cases and contro

> versies" within the meaning of Article III, as shown by the fact that *these* cases are reviewable by the Supreme Court under its appellate jurisdiction."

The added and emphasized material suggests wherein the reasoning of the Court of Appeals is deficient.

(a) The absence of any reference to Article III in the first two sentences of the quotation makes clear that the Court of Appeals failed to attribute material significance to the point, invoked by petitioner, that the process rights secured to people by the Constitution under Article III *and* the procedural provisions of the Bills of Rights, read together, are more inclusive and specific than would flow to them under the Due Process Clause of the Fifth Amendment, alone. See *United States ex rel Toth* v. *Quarles*, *supra*; and see *Kinsella* v. *Singleton*, 361 U. S. 234, 238, 246, 249 (1960). See also *Cohens* v. *Virginia*, *supra*. This error clearly infected the central conclusion that the differences between the customs courts and the Art. III district Courts do not rise to a level of material significance, for the final adverse determination of substantive Constitutional claims, under the process guarantees of the Constitution. Despite any multitude of similarities between an Art. III Court and some other tribunal, the difference between enjoying and not enjoying Art. III status is of obvious critical significance when it comes to satisfying any right of access *to an Art. III Court* that is secured to a claimant by Due Process *and* Article III. Compare Mr. Justice Johnson concurring in *Martin* v. *Hunter's Lessee*, *supra*.

(b) Moreover, the showing of allegedly critical similarities between the Court of Customs and Patent Appeals

and Article III courts, is deficient in two material respects. First, while the Court of Customs and Patent appeals does, indeed, adjudicate "cases or controversies", it also performs non-judicial functions which deny it status as an Art. III Court. See subpoint (4), *infra*. Second, while the Judges of the Court of Customs and Patent Appeals enjoy tenure and salary "independence", comparable to the Judges of Art. III Courts (and to various other federal and state adjudicators), they hold commissions as permanently specialized judges. And, subject-matter specialization, on a permanent basis, has been considered incompatible with an Art. III Judgeship. See subpoint (4), *infra*.

3. The importance of plenary consideration of this question, concerning the process rights of litigants in relation to the jurisdiction of the various federal courts, by this Court, at this time, becomes clear when one contemplates the likely consequences of not acting to afford further guidance for the whole profession on the great importance, in the present and comparable situations, of the greatest caution about foreclosing opportunities for resort to *other* Art. III Courts for the assertion of grave federal claims on which persons enjoy, or *may* enjoy, Constitutional rights to be heard in *some* Art. III Court. The increased pressure on this Court, when it is made the only Art. III court to which resort is authorized by statute, would surely threaten the Court's effective functioning and might well disturb the basic adjustment of this Court's appellate jurisdiction effected by the decision in *Durousseau* v. *United States*, 6 Cranch 307 (10 U. S. 1810).

(a) The distorting impact on exercise of discretionary jurisdiction which would follow if petitions for certiorari

to this Court were the only form by which grave federal claims could be tendered to any Art. III Court has only been collaterally touched upon heretofore. See *Brown* v. *Allen*, 344 U. S. 443, 489-97 especially following note 6. Further elaboration of this point by this Court has been made necessary by the reasoning and holding below.

(b) When this Court is allowed to become the *sole* place of resort maintained under Art. III, the Constitutionality under Art. III and Due Process of a statute which limits such resort so that *access* comes *only by grace*, never of right, would be so dubious, as applied to various claims, that an ominous shadow would be cast on the compatability with this Court's obligations under Art. III and Due Process of continued adherance, without exceptions, to the deferential rule for the construction of Congressional statutes concerning this Court's appellate jurisdiction that was announced in *Durousseau* v. *United States*, 6 Cranch 307 (10 U. S. 1810). Compare *Ex parte McCardle*, 7 Wall 506 (74 U. S. 1869) where the *Durousseau* rule *was* reconsidered and the challenged statute ultimately sustained, (after deliberation and rejection of a retroactivity point),[9] on an evaluation of Congressional intent going outside of and beyond ordinary *Durousseau* construction of the statute. *Cf. United States* v. *Klein*, 13 Wall 128 (80 U. S. 1872), where a statute, clearly restrictive of jurisdiction, was measured for Constitutionality and held Unconstitutional because of the substantive effects it attempted to accomplish. Moreover, shadows on, or unnecessary inroads into, the generally salutory ruling in *Durousseau* would generate confused practices in this Court almost as surely as this Court's practice was, and has remained,

9. *Cf. United States* v. *Klein*, *infra*.

distorted ever since *McCardle* was ameliorated by *Ex parte Yerger*, 8 Wall 85 (75 U. S. 1869). Compare, re jurisdiction over Habeas Corpus proceedings for persons detained outside the Circuits, the sequence of decisions summarized in HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 284-7 (1953).

4. Assuming that Eastern States is judged to enjoy a Constitutional right to be heard on its claim in *some* Art. III Court, it becomes necessary to face a subsidiary question, avoided below. Was the Act of August 25, 1948, 72 Stat. 848, amending 28 U.S.C. § 211, which "declared" the court of Customs and Patent Appeals to be an Art. III Court, Constitutionally effective?

(a) The very probable Unconstitutionality of that Act can be readily documented. When this Court held the Court of Customs Appeals to be an Art. I Court in *Ex parte Bakelite*, 249 U. S. 238 (1929), this Court reasoned that the manifested or declared intention of Congress on which of its powers it meant to be exercising is *not* determinative. See 249 U. S. at 459. The really determinative factors on Art. III or Art. I status for a Congressional created courts are, of course, the terms and provisions of all the Congressional statutes by which the Court is established, manned and empowered. On the importance of its powers and functions, see *Bakelite*, *supra*; *Williams v. United States*, 289 U. S. 553 (1933) and *McBride v. Teeple*, 331 U. S. 649 (1940); and see STERN & GRESSMAN, SUPREME COURT PRACTICE 47-50 (Rev. ed. 1954), and NOTE, *The Constitutional Status of The Court of Claims*, 68 HARV. L. REV. 527, 531-4 (1955). On the importance of how the tribunal is manned, see *United States ex rel Toth v. Quarles*, 350 U. S. 1, 18-19 note 44; *Cohens v. Virginia*, 6 Wheat. 264, 387 (19 U. S. 1821). See also 1 SUBERMAN,

THE INTERSTATE COMMERCE COMMISSION 63-70 (1931); and see Casenote, 69 HARV. L. REV. 760 (1956).

Taken together all these cases established that unless the powers and duties of a court, *and* the judgeships which are held by the individuals who sit on the court, all have incidents or characteristics that are compatible with the requirements of Article III, the court is not an Article III Court. But, (despite the apparently contrary conclusion of the Court of Appeals), the Court of Customs and Patent Appeals is still vested with powers and duties held to be outside the confines of Article III. See *Bakelite* and *McBride*, *supra*. And the Court is currently manned by individuals who were appointed to, and hold, *permanently specialized* judgeships which are incompatible with Article III Status. Compare *Toth*, *supra*, 350 U. S. at pp. 18-19, n. 140. See also, concerning the importance attached by Congress to providing non-permanent commissions to sit on the old Commerce Court, SHAREMAN, *op. cit. supra*, and the references there cited. Note also that Congress provided that the Emergency Court of Appeals should be manned by assignments of Article III Judges. See Section 204(e) of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C. App. §901 *et seq.* (Supp. V, 1946).

Even if the new provisions for temporary assignment of customs court judges to Article III courts will work to change the character of the judgeships, despite the contrary line of reasoning in *Bakelite*, *supra*, then still, the *present* members of that Court have not been properly "appointed" to those *new* judicial offices, by individual Presidential nominations and Senate confirmations thereof, as Article II, Section 2, requires; instead, they have been collectively "enacted" into those new judgeships by ordinary procedures for the Congressional passage and Presi-

dential approval of Bills for Acts. Proper practice for effecting an immediate change from Art. I to Art. III status is illustrated by the provisions in Section 9 of the Hawaiian Statehood Act which effected such a change but carefully provided for a new appointment to the new Article III Judgeship. See 73 Stat. 4, 8 (1959). See also the provisions of the Alaska Statehood Act, 72 Stat. 339 (1958) concerning the "interim" and the "permanent" District Courts, cited and discussed in *Metlakatla Indian Community* v. *Egan* 363 U. S. 555, 557-8 (1960). Concerning the evils inherent in the legislative practice of "enacting" sitting officials into non-legislative offices, see *Richman* v. *Ligham*, 22 N. J. 40, 123 A. 2d 372 (1956) surveyed in Moran, *General Administrative Law*, 11 Rutgers L. Rev. 30 at 33-4 and 37-9 (1956).

(b) The independent public importance of this subsidiary question is augmented by the circumstance that this declaratory Act is one of a package of three such acts, covering the Customs Court and the Court and the Court of Claims as well[10]; and, all bear on the proper assignment of the specialist judges to sit in cases in the other Courts.[11] And, of course; the importance of this subsidiary question both adds to, and is augmented by, the importance of the whole question.

(c) This subsidiary question has been professionally ripened for deliberation here by its discussion in the Court of Appeals including the citation to Professor Moore's articulation of a (heretofore absent) theory in favor of

10. Beyond 28 U.S.C. §211 as amended, *supra*, (CCPA) see also, as amended, 28 U. S. C. §251 (Cust. Ct.) and §171 Ct. Cl.).

11. See Casenotes, 69 Harv. L. Rev. 760 (1956).

Constitutionality, despite *Bakelite*, *supra*. See 1 MOORE, FEDERAL PRACTICE, Par. 0.4 [4] (2nd ed. 1959).[12]

III. A reversal of the dismissal below, in order to permit deliberation of the merits of the constitutional claim asserted by Eastern States, has become a matter of grave public importance.

At first glance, this Court's denials of certiorari in the companion cases in the Customs Courts to which this action is related[13] appear to reflect adversely on the relative public importance of this PETITION. But, since *Brown* v. *Allen*, 344 U. S. 443 (1953), it should be clear, on second thought, that those earlier denials are *not* a reliable measure of the relative public importance of this PETITION. Those denials are likely to have been influenced by the then apparently available opportunity for alternative assertion of the Constitutional contention, advanced in those petitions, through an action in a District Court. See *Brown* v. *Allen*, *supra*, 344 U. S. at 489-97. Now that this *then* apparently available, alternative remedy-proceeding has been held to be unavailable, the relative public importance of this PETITION requires fresh and independent assessment. Compare *Brown* v. *Allen*, *supra*.

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12. Professor Moore proposes an extension of the hybrid, Art. III *and* Art. I, status for federal courts opened up by *O'Donoghue* v. *United States*, 289 U. S. 516. But a majority of this Court was unwilling in *Tidewater*, 337 U. S. 582 (1949) to follow Mr. Justice Jackson's proposal, 337 U. S. at 591-2, to extend *O'Donoghue*. And, given the non-judicial powers and duties of the Court of Customs and Patent Appeals, discussed above, because of its expressed limitations, even Justice Jackson's opinion cannot be cited in favor of the extension of *O'Donoghue* which Professor Moore has proposed. See 337 U. S. at 590-1.

13. See JURISDICTIONAL STATEMENT at 12.

Indeed, because the substantiality of our Constitutional claim has, properly,[14] not been questioned thus far, the dismissal of our action might qualify, without more, for review by certiorari now that that claim can not be heard hereafter in any other Art. III Court. *Cf. Brown* v. *Allen*, *supra*, 344 U. S. at 489-97. But the obvious importance to on-going administration of the Trade Agreements program[15] of an early consideration of this Constitutional

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14. Compare *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 758 n. 12 and 772-4 (1947) and *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 553 n. 22 (1954). *Cf. Kent* v. *Dulles*, 357 U. S. 116, 129 (1958). See PETITION FOR WRITS OF MANDAMUS at 35-39.

15. Subsequent amendments, 69 Stat. 162 (1955), of the Reciprocal Trade Agreements Act, which appear to make the Act read like the Court of Customs and Patent Appeals had construed it to read, serve to increase the importance *to the public* of an adjudication *of the merits* of Eastern States action.

The amending Congress did not provide any new, *explicit*, alternative standards to control rate-changing accomplished by exercise of the power to terminate one (or more) Agreement-Proclamations. And, neither the Court of Customs and Patent Appeals nor the Executive has evidenced awareness of the need to search for and find *other*, *implicit* and Constitutionally "adequate", statutory controls to be complied with when exercising that special power to change rates (if it is to be freed of the traditional statutory controls which have heretofore sustained the Constitutionality of Congressional delegations of its rate-changing powers). Thus, there is a clear and present need for an opinion by an Art. III court which will determine, or evaluate and deliberately avoid, our ("serious") Constitutional challenge to the Act *as construed;* such an opinion is needed in order to provide a timely and authoritative reminder of the critical need for the executive to find, and comply with, "adequate", *implicit* controls in the Act *as amended*.

Even if disposition of Eastern States' action were *ultimately* to be *grounded* on a straight-forward reading of the pre-1955 Act and of the challenged Proclamation, (as the companion cases were decided at the trial level by the Customs Court), by deliberate judicial avoidance of the Constitutional question, as "serious", the decision would still be of public importance, since deliberate avoidance of the Constitutional question would cue Executive recognition of the need to search for, find, and comply with the "adequate" controls that may

question via the three judge-direct appeal process so augments the relative public importance of the proposed review and relief as to make this PETITION even more clearly worthy of a favorable exercise of discretion. Indeed respondent Rogers recently highlighted the great importance to on-going programs of tariff revision of this Court's considering basic and recurrent questions concerning the limits on discretion to change rates of duty, delegated to the President by customs legislation, when he publicized[16] his intention to petition for review of the decision in *United States* v. *Schmidt, Pritchard & Co., Mangano Cycles Co.*, Customs Appeal No. 4980, C.C.P.A., July 20, 1960.

Conclusion

For the foregoing reasons, petitioner submits that a writ of certiorari should be issued. Indeed, petitioner suggests a writ should issue even if the Court grants our companion MOTION TO REINSTATE THE APPEAL, in order to insure review of the important holdings below, via certio-

be implicit in the Act, as amended. Such Executive recognition could avoid the now likely promulgation of "terminating proclamations" that will be subsequently invalidated(a) on the ground that they were promulgated without compliance with the controls on rate-changes by "terminating proclamations" (then) found to be implicit in the amended Act or (b) on the ground that no implicit controls over "terminating proclamations" are discernible in the amended Act that are "adequate" to forestall the judicial conclusion that Congress has abdicated its Constitutional responsibility for the operative customs rates; such a conclusion of Unconstitutionality which would follow, of necessity, if the Act now purports to permit the President to freely manipulate "terminating proclamations" so as to impose *any* customs rate, that was ever negotiated and proclaimed at any time past, in order to *then* implement the now *long-standing* program for tariff reduction and revision, by *negotiated inter-national agreements* and *implementing* proclamations, which Congress established decades ago and *properly* committed to the President for implementation.

16. See Wall Street Journal, Aug. 15, 1960, p. 4, Col. 4.

rari, against the possibility that the Court may conclude, on plenary deliberation, that it lacks jurisdiction over the Appeal. *Cf. Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 380-1 (1949) (writ issued, after the holding against jurisdiction over the direct appeal, when alternative appeal to Court of Appeals had not yet been heard).

Respectfully submitted,

GERARD R. MORAN
Counsel for Petitioner

August, 1960

(See next page.)

Motion to Use Prior Appendix-Records in Making Up Record for Plenary Proceedings

Eastern States' moves the Court for an order authorizing the requisite 40 copies of the printed record for plenary proceedings to be made up, so far as the Clerk finds practicable, by use of the printed Appendicies to the documents previously filed in this Court in this case. *Cf.* R. R. 36(3) and 36(4).

Re-covered copies of the comprehensive Appendix-record of Eastern States PETITION FOR WRITS OF MANDAMUS, Misc. No. 34, October Term, 1959, (supplemented only by four newly printed pages, See n. 3, *supra*), were used as the JOINT APPENDIX in the appeal to the Court of Appeals. But, Eastern States has no further copies of that JOINT APPENDIX to file pursuant to R. R. 36(4) and preparation of the necessary copies of that APPENDIX exhausted Eastern States' supply of extra copies of its PETITION FOR WRITS OF MANDAMUS from which further copies of the JOINT APPENDIX might otherwise have been constructed.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15109

EASTERN STATES PETROLEUM CORPORATION, APPELLANT

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided May 12, 1960

Mr. Gerard R. Moran, of the bar of the Supreme Court of Virginia, *pro hac vice*, by special leave of court, with whom *Mr. Edwin G. Martin* was on the brief, for appellant.

Mr. Seymour Farber, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Messrs. Oliver Gasch*, United States Attorney, and *Alan S. Rosenthal*, Attorney, Department of Justice, were on the brief, for appellees.

Before WILBUR K. MILLER, BAZELON and FAHY, Circuit Judges.

BAZELON, *Circuit Judge:* This appeal from the District Court relates to appellant's attack, begun in the United States Customs Court some eight years ago, upon the tax

rate imposed upon petroleum imports between January 1, 1951 and October 11, 1952. The Customs Court proceedings were stayed pending the outcome of two other cases raising substantially identical questions. The importers in these cases contended that the President's proclamation increasing the duty from one-fourth to one-half cent per gallon was contrary to statute and an unconstitutional exercise of power.[1] The Court of Customs and Patent Appeals ultimately rejected these claims and the Supreme Court denied certiorari.[2]

Appellant, whose case is still pending in the Customs Court, then brought the instant suit to enjoin the Attorney General, the Secretary of the Treasury, and their subordinates from enforcing the tax through proceedings in the customs courts.[3] The complaint asserted that, as a result of the unfavorable decisions in the two companion cases, appellant's opportunity to secure recognition of its constitutional rights in the customs courts has become "so onerous, hazardous and speculative that it constitutes an inadequate remedy . . . which plaintiff may by-pass" to secure redress in a tribunal with statutory authority to enjoin administrative officials. It also as-

[1] Specifically, the importers' position is that a provision in the Reciprocal Trade Agreements Act then in force, 19 U.S.C. § 1351 (1952), prohibited the President from increasing the duty by more than fifty percent. The importers further contend that if, as the Court of Customs and Patent Appeals held, such limitation does not apply to the type of increase here involved, there are no constitutionally adequate statutory standards to guide the President in the exercise of his rate-revising authority.

[2] *United States* v. *Metropolitan Petroleum Corp.*, 42 C.C.P.A. (Customs) 38, *cert. denied*, 348 U.S. 858 (1954); *United States* v. *American Bitumuls & Asphalt Co.*, 246 F.2d 270, 44 C.C.P.A. (Customs) 199, *cert. denied*, 355 U.S. 883 (1957).

[3] This refers to both the Customs Court, and the Court of Customs and Patent Appeals.

serted that Article III and the due process clause of the Constitution entitle it to have its constitutional claims adjudicated in a court created under Article III. Appellant requested that a three-judge court be convened, pursuant to the provisions of 28 U.S.C. § 2282 (1958).

The Government moved to dismiss the complaint for lack of jurisdiction. District Judge McGarraghy, sitting alone, granted the Government's motion. Appellant thereupon applied to the Chief Judge of this Circuit for an order designating two additional judges to complete a three-judge district court. Chief Judge Prettyman denied the motion.[4] Appellant then sought review from Judge McGarraghy's ruling by direct appeal to the Supreme Court, and moved for leave to file a petition for a writ of mandamus against Chief Judge Prettyman and District Judge McGarraghy. The Supreme Court dismissed the appeal[5] and denied the motion.[6] Appellant thereupon prosecuted the present appeal from the dismissal below.[7]

We think the District Court correctly decided that it lacked jurisdiction. Under the distribution of judicial power which Congress has established, the Customs Court has "*exclusive* jurisdiction to review on protest the decisions of any collector of customs . . . ." 28 U.S.C. § 1583 (1958) (emphasis supplied). Conversely, 28 U.S.C. § 1340 provides that "The district courts shall have original

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[4] 105 U.S.App.D.C. 219, 265 F.2d 593 (1959).

[5] *Eastern States Petroleum Corp.* v. *Rogers*, 361 U.S. 7 (1959).

[6] *Eastern States Petroleum Corp.* v. *Prettyman*, 361 U.S. 805 (1959).

[7] Our jurisdiction to review the action of the District Court is not questioned. See *Wicks* v. *Southern Pacific Co.*, 231 F.2d 130 (9th Cir.), *cert. denied*, 351 U.S. 916 (1956). Appellant protected its right of appeal to this court by securing from the District Court extensions of the time in which to docket the record on appeal.

jurisdiction of any civil action arising under any Act of Congress providing for . . . revenue from imports or tonnage *except matters within the jurisdiction of the Customs Court.*" 28 U.S.C. § 1340 (1958) (emphasis supplied). This jurisdictional scheme is not limited to non-constitutional matters, for it is clear that the customs courts can and do, as in the two companion cases, pass upon constitutional questions. *Horton* v. *Humphrey*, 146 F. Supp. 819, 821 (3-judge court, D.D.C.), *affirmed per curiam*, 352 U.S. 921 (1956); *Morgantown Glassware Guild, Inc.* v. *Humphrey*, 98 U.S.App.D.C. 375, 236 F.2d 670, *cert. denied*, 352 U.S. 896 (1956). Decisions of the Court of Customs and Patent Appeals are reviewable in the Supreme Court on writ of certiorari, 28 U.S.C. § 1256 (1958).

Appellant contends, however, that the District Court has jurisdiction notwithstanding the exception in § 1340, since this is not a case "arising under any Act of Congress providing for . . . revenue from imports . . . ." Rather, they contend it is a case "arising under the Constitution, laws, or treaties of the United States," and thus within the ambit of 28 U.S.C. § 1331 (1958). Section 1331 vests federal question jurisdiction in the district courts and, unlike § 1340, contains no exception relating to Customs Court jurisdiction. But we do not agree that Congress' failure to provide an exception to § 1331 similar to that specified in § 1340 indicates an intent to open a loophole in its clear purpose to exclude customs cases from the district courts. When Congress provides a specific judicial remedy, relief may generally be accorded only through the specified procedure. Cf. *Lichter* v. *United States*, 334 U.S. 742, 789-93 (1948); *Lockerty* v. *Phillips*, 319 U.S. 182 (1943). Moreover, the right to equitable relief presupposes the non-existence of an adequate remedy at law. The customs courts provide an adequate remedy except in cases of extreme hardship, *Horton* v. *Humphrey*, *supra*. The fact that the customs

courts are likely to reject appellant's constitutional claims does not make this a case of unusual hardship. *Cottman v. Dailey*, 94 F.2d 85, 89 (4th Cir. 1938).

Appellant attacks the foregoing construction of these jurisdictional statutes on the ground that, at some stage of the litigation, it is constitutionally entitled to have its constitutional claims heard and determined in an Article III court, and that such a hearing must be available as of right and not as a matter of discretion.

There is at the outset considerable doubt as to whether the customs courts are legislative rather than Article III courts. Some years ago, the Supreme Court held that the Court of Customs Appeals (now the Court of Customs and Patent Appeals) was a legislative court, *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929); that is to say, it was a court created under the congressional power "to lay and collect Taxes, Duties, Imposts and Excises," U.S. Const. art. I, § 8, and not under the power to "ordain and establish" courts inferior to the Supreme Court, U.S. Const. art. III, § 1. But Congress has recently revised the statutes creating the customs courts and stated that they are "hereby declared to be . . . court[s] established under Article III of the Constitution of the United States." 28 U.S.C. §§ 211, 251 (1958). Petitioner contends, however, that such declaration is ineffective to create an Article III court because the Supreme Court said in *Bakelite* that "whether a court is of one class or the other [does not] depend on the intention of Congress . . . the true test lies in the power under which the court was created and in the jurisdiction conferred." 279 U.S. at 459. But see 1 Moore, Federal Practice § 0.4[4] (1959).

We do not decide, however, whether the expression of congressional intent is sufficient to transform the customs courts into Article III tribunals. For even if the customs courts are still legislative courts we think petitioner's argument must fail. It was previously, and we think correctly, rejected in *Ricomini v. United States*, 69 F.2d 480, 483-84 (9th Cir. 1934).

We recognize, as appellant argues, that "A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored." *Lockerty* v. *Phillips*, 319 U.S. 182, 188 (1943); see *Lynch* v. *United States*, 292 U.S. 571, 586-87 (1934). And we assume, for present purposes, that the congressional power to confer and withdraw federal jurisdiction is itself subject to constitutional limitations, including those of due process. *Crowell* v. *Benson*, 285 U.S. 22, 56 (1932); *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 355 U.S. 887 (1948); see HART & WECHSLER, FEDERAL COURTS AND THE FEDERAL SYSTEM 312-40 (1953). But this is not a case where there is an asserted constitutional right without a constitutionally adequate remedy. Certiorari may be sought in what is obviously an Article III court. And even in cases where an adverse decision of the customs courts involving constitutional questions stands unreviewed, we do not think the taxpayer is denied due process. In our view, the distinctions between the customs courts and the district courts do not rise to a level at which it may be said that final adjudication of constitutional questions in the customs courts offends the requirements of due process. Judges of the customs courts, like judges of Article III courts, are appointed by the President, with the advice and consent of the Senate, and serve "during good behavior." Customs courts entertain "cases and controversies" within the meaning of Article III, as shown by the fact that these cases are reviewable

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[8] See 28 U.S.C. § 213 (Court of Customs and Patent Appeals), § 252 (Court of Customs), § 44 (circuit courts), § 134 (district courts) (1958).

Judges of the Customs Court receive the same salary as district judges, compare 28 U.S.C. § 213 (1958) with 28 U.S.C. § 135 (1958); judges of the Court of Customs and Patent Appeals receive the same salary as circuit judges, compare 28 U.S.C. § 252 (1958) with 28 U.S.C. § 44(d) (1958).

by the Supreme Court under its appellate jurisdiction.[9] We therefore reject appellant's constitutional objections to its exclusion from the District Court.

The only remaining question is whether the District Court was authorized to dismiss the complaint without requesting the convening of a three-judge court.[10] Prior to 1942, the law was well settled that "the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction" and "does not require three judges to pass upon this initial question of jurisdiction." *Ex parte Poresky*, 290 U.S. 30, 31-32 (1933).

Petitioner asserts, however, that the 1942 amendment providing that "A single judge shall not . . . dismiss the action" has overturned the prior rule.[11] Although there

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[9] *United States* v. *Stone & Downer Co.*, 274 U.S. 225, 232-33 (1927); see, *e.g.*, *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (1933); cf. *Pope* v. *United States*, 323 U.S. 1, 13-14 (1944). See generally, ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §§ 248-49 (2d ed. Wolfson & Kurland 1951).

[10] 28 U.S.C. § 2282 (1958) provides that an "injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted . . . [except] by a district court of three judges under section 2284 of this title."

[11] 28 U.S.C. § 2284 now reads in pertinent part:

> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of

are some shreds of legislative history to support this view,[12] consistent judicial construction has rejected it. In *White* v. *Gates*, 102 U.S.App.D.C. 346, 253 F.2d 868, *cert. denied*, 356 U.S. 973 (1958), this court said, "without convening a three-judge court . . . a single judge may still dismiss a complaint that . . . fails to raise a substantial constitutional question." The Ninth Circuit reached the same conclusion in *Wicks* v. *Southern Pacific R.R.*, 231 F.2d 130 (9th Cir.), *cert. denied*, 351 U.S. 946 (1956). And in *Jacobs* v. *Tawes*, 250 F.2d 611 (4th Cir. 1957), the Fourth Circuit held that a single judge may dismiss an application for a three-judge court if the district court, no matter how constituted, lacks jurisdiction. Finally, Chief Judge Prettyman, in an earlier phase of this litigation, reached the same conclusion. 105 U.S.App.D.C. 219, 265 F.2d 593 (1959). As these decisions make clear, the provision of § 2284 precluding single-judge dismissal, along with the other procedural requirements of that section, becomes operative only after a three-judge court is

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the court to hear and determine the action or proceeding.

. . . .

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. *A single judge shall not* appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or *dismiss the action*, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing. [Emphasis supplied.]

[12] ~~Petitioner~~ Appellant places particular reliance upon a report of the Bar Association of the City of New York stating that it believed the bill would overrule *Ex parte Poresky*, 290 U.S. 30 (1933), and that this result was desirable. See H.R. REP. No. 1677, 77th Cong., 2d Sess. 5 (1942). But there is no indication that any member or committee of Congress embraced this suggestion or anticipated such a result.

convened. This is implied from the introductory passage of § 2284, reprinted in the margin at note 3. *If*

The action of the District Court is therefore

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,109

September Term, 1959

Civil 1402-58

EASTERN STATES PETROLEUM CORPORATION, *Appellant*,

v.

WILLIAM P. ROGERS, Attorney General of the United States, et al., *Appellees*.

Appeal from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Bazelon and Fahy, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Bazelon.

Dated: May 12, 1960

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No. 391

In the Supreme Court of the United States

OCTOBER TERM, 1960

EASTERN STATES PETROLEUM CORP., PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
ALAN S. ROSENTHAL,
Attorney,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 391

EASTERN STATES PETROLEUM CORP., PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum decision of the District Court (J.A. A1)[1] is reported at 177 F. Supp. 944.

The opinion of Chief Judge Prettyman, denying petitioner's motion for leave to file an application for an order designating two judges to complete a three-judge district court (J.A. A4–A14) is reported at 265 F. 2d 593.

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App.) is not yet reported.

[1] "J.A." refers to the joint appendix to the briefs in the court below, which has been filed in this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1960. A timely filed petition for a rehearing *en banc* was denied on June 7, 1960. The petition for a writ of certiorari was filed on September 6, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a suit in the Customs Court constitutes petitioner's exclusive judicial remedy.

2. Whether, upon determining that the issues raised by petitioner's complaint were not cognizable in a federal district court, the single-judge district court properly dismissed the complaint.

STATUTES INVOLVED

The relevant sections of 28 U.S.C. are set forth in the Appendix, *infra*, pp. 18–19.

STATEMENT OF THE CASE

The underlying controversy—one which petitioner has sought to litigate in a federal district court—involves the tax rate on certain fuel oil imports made between January 1, 1951, and October 11, 1952. (J.A. A15) The factual and statutory background is concededly identical with that in two cases which have been fully litigated through the Customs Court and the Court of Customs and Patent Appeals. (J.A. A17–A19) In both of those cases, the Court of Customs and Patent Appeals held that the fuel oil imports were subject to a tax of ½ cent per gallon and this Court denied certiorari. (J.A. A18, A19) *United States* v. *Metropolitan Petroleum*

Corp., 42 C.C.P.A. (Customs) 38, certiorari denied, 348 U.S. 858; *United States* v. *American Bitumuls & Asphalt Co.*, 44 C.C.P.A. (Customs) 199, certiorari denied, 355 U.S. 883.[2]

Some five months after the denial of certiorari in *American Bitumuls*, the petitioner here, whose protest was and is still pending before the Customs Court, wrote to Assistant Attorney General Doub of the Civil Division of the Department of Justice, and stated, in pertinent part (J.A. A25, A26):

> For reasons heretofore advanced in briefs filed by this office and served on you in [the] American Bitumuls case and in the case of *United States* v. *Metropolitan Petroleum Corp.*, C.A.D. 567, we asserted that assessment beyond ¼ cent per gallon is without authority in law. In both of the above suits, you defended the assessment and contested our contentions.
>
> In each of said cases, the Court of Customs and Patent Appeals rejected our construction of the applicable statute and construed said statute so as to sustain Presidential Proclamation No. 2901, the alleged authority for the assessment. The Court also reversed our contention that said statutes as thus construed would be unconstitutional.
>
> We request you to reconsider your view with respect to these pending cases specifically those in the name of *Eastern States Petroleum Co.*

[2] For a detailed discussion of the factual and statutory background, we respectfully refer the Court to the opinions of the Court of Customs and Patent Appeals in those cases. It may be noted that the attorney for the oil importers in the two earlier cases is also of counsel for the petitioner here.

> v. *United States*, set forth on the stipulation annexed hereto and to enter into the enclosed stipulation agreeing that the correct rate of duty for the merchandise covered by the entries named in said case is ¼ cent per gallon.

On March 24, 1958, the Chief of the Customs Section of the Civil Division of the Department of Justice, on behalf of Assistant Attorney General Doub, responded in pertinent part as follows (J.A. A27, A28):

> Your proposed stipulation sets forth that the merchandise, the subject of the protests, was assessed with duty at ½ cent per gallon under purported authority of Presidential Proclamation No. 2901 and then states that such merchandise is properly dutiable at ¼ cent per gallon.
>
> I cannot sign such an agreement. The cases of *United States* v. *Metropolitan Petroleum Corp.*, C.A.D. 567, and *United States* v. *American Bitumuls & Asphalt Co., et al.*, C.A.D. 661 (certiorari denied Nov. 25, 1957) both uphold the assessment of the ½ cent per gallon tax under the provisions of Section 3422 of the Internal Revenue Code (26 U.S.C.).
>
> Your stipulation is returned herewith unsigned.

Shortly thereafter, petitioner instituted this suit in the District Court (J.A. A14–A22) seeking to enjoin Attorney General Rogers and Assistant Attorney General Doub from enforcing the Act of Congress upon which the imposition of the import tax is based by "bringing about [its] adjudicatory application to plaintiff by the customs courts" (J.A. A19, A21); or,

in the alternative, to enjoin Messrs. Rogers and Doub from refusing to stipulate that the lawful rate of duty was ¼ cent per gallon (J.A. A22). Petitioner also demanded that Secretary of the Treasury Anderson be enjoined "from authorizing his subordinate officials from enforcing the said Act." (J.A. A21, A22.)

The Government filed a motion to dismiss for lack of jurisdiction, urging that the subject matter of the complaint was within the exclusive jurisdiction of the Customs Court (J.A. A29). Petitioner then filed a composite motion for summary judgment, "for an order providing for an integrated hearing of said motion and of defendant's motion to dismiss, and for an order convening a pre-hearing conference." (J.A. A30, A31.) Simultaneously, petitioner filed an "application for the convening of a statutory court of three judges." (J.A. A32.)

On November 25, 1958, the District Court granted the Government's motion to dismiss for lack of jurisdiction (J.A. A1). In its "Memorandum" on the motion (177 F. Supp. 944), the court stated, "Since this Court is wholly without jurisdiction, it is not necessary to convene a three-judge court to pass on that question but action may be taken by a single judge. *Jacobs* v. *Tawes*, 4 Cir., 250 F. 2d 611." The final order dismissing the complaint and denying the petitioner's application for a three-judge court was entered on December 10, 1958. (J.A. A2.)

On December 18, 1958, petitioner filed in the Court of Appeals for the District of Columbia Circuit a "Motion for Leave to File an Application to the

Chief Judge of the Circuit for an Order Designating Two Judges to Complete the Full District Court of Three Judges to Hear Motion for Review." (J.A. A33–A35.) At the conclusion of oral argument of the motion on January 7, 1959, it was denied by Chief Judge Prettyman (J.A. A3).

Petitioner thereafter attempted to take a direct appeal to this Court from the judgment of the District Court. (J.A. A39–A42.) With the filing of its Jurisdictional Statement, it also filed in this Court a motion for leave to file a petition for a writ of mandamus directed against Judge Prettyman and Judge McGarraghy. On October 12, 1959, the Court dismissed petitioner's appeal and denied the motion for leave to file the petition for a writ of mandamus (J.A. C1).

Thereafter, petitioner prosecuted its appeal to the Court of Appeals from the judgment of the District Court.[3] On May 12, 1960, the Court of Appeals affirmed. It concluded (1) that the District Court lacked jurisdiction, and exclusive jurisdiction resided in the Customs Court, and (2) that, in the circumstances, the dismissal of the action by a single-judge district court was appropriate. On June 7, 1960, petitioner's petition for a rehearing *en banc* was denied (Pet. 3).

On June 24, 1960, petitioner filed, in this Court, a "Motion To Recall The Judgment And Reinstate The Appeal," *i.e.*, the appeal which had previously been

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[3] Petitioner had filed a notice of appeal on February 6, 1959; the perfection of the appeal was held in abeyance pending the final disposition of the proceedings in this Court.

dismissed by this Court (Pet. 2). This motion is still pending.

ARGUMENT

The decision below that this suit was properly dismissed by the single-judge district court is clearly correct. Congress was explicit in vesting sole jurisdiction over this type of controversy in the Customs Court and, in these circumstances, a single-judge district court has plain authority to dismiss the complaint even though the convening of a three-judge district court had been requested. Moreover, there is no conflict in decisions. Further review by this Court is, therefore, not warranted.

1. Through the establishment of the Customs Court and the Court of Customs and Patent Appeals, with ultimate review in the Supreme Court by a writ of certiorari, Congress has provided an avenue for obtaining redress for asserted grievances or wrongs occurring in the operation of laws relating to the exaction of duties by customs collectors. And in providing a specialized forum for considering controversies arising out of such exactions, Congress has stipulated that the jurisdiction vested in the Customs Court shall be exclusive. 28 U.S.C. 1583, *infra*, p. 18, declares:

> The Customs Court shall have exclusive jurisdiction to review on protest the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury; * * *.

To dispel all doubt as to the exclusiveness of the Customs Court jurisdiction, Congress, in defining the original jurisdiction of the district courts, has expressly excepted from the jurisdiction of the district courts "matters within the jurisdiction of the Customs Court." 28 U.S.C. 1340, *infra*, p. 18. Final decisions of the Customs Court are subject to review by appeals to the Court of Customs and Patent Appeals (28 U.S.C. 1541) and, in turn, "Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiora[illegible]" 28 U.S.C. 1256, *infra*, p. 18.

The explicit provisions placing jurisdiction in the Customs Court—to the exclusion of the district courts—mark the continuation of a well-defined and long-established policy.[1] Thus, the courts have re-

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[1] Congress initiated this practice with the Customs Administrative Act of 1890 (26 Stat. 131), in which it undertook the establishment of a separate specialized system of courts for the resolution of customs controversies. In the 1890 Act, Congress provided for a Board of General Appraisers (Section 12, 26 Stat. 136), which was to have jurisdiction over all protests from decisions of the collectors of customs, and appeals for reappraisement. Sections 12–14, 26 Stat. 136–138. Under Section 15 of the 1890 Act (26 Stat. 138), the courts of general jurisdiction participated in this review procedure at the appellate level. However, even this participation was eliminated by the Tariff Act of 1909, 36 Stat. 11, 91. By that Act, Congress withdrew from the courts of appeals jurisdiction to review decisions of the Board of General Appraisers and vested that jurisdiction in the Court of Customs Appeals, which it simultaneously established. Section 29, 36 Stat. 105–107. In 1926, the Board of General Appraisers was redesignated as the Customs Court. 44 Stat. 669. The present provision for exclusive jurisdiction in that court (28 U.S.C. 1583) first appeared in the 1948 revision of the Judicial Code (62 Stat. 943).

peatedly recognized, even in cases which arose prior to the adoption of the explicit provision appearing in 28 U.S.C. 1583, that the Customs Court has exclusive jurisdiction with respect to customs controversies, and that, by the same token, the district courts are without jurisdiction. *Morgantown Glassware Guild, Inc.* v. *Humphrey*, 98 App. D.C. 375, 236 F. 2d 670, certiorari denied, 352 U.S. 896; *United States* v. *Sherman & Sons Co.*, 237 U.S. 146, 152; *Boston Wool Trade Ass'n* v. *Snyder*, 82 App. D.C. 144, 161 F. 2d 648; *United States* v. *Cottman Co.*, 190 F. 2d 805 (C.A. 4), certiorari denied, 342 U.S. 903; *Cottman Co.* v. *Dailey*, 94 F. 2d 85 (C.A. 4); *David L. Moss Co.* v. *United States*, 103 F. 2d 395 (C.C.P.A.); *Riccomini* v. *United States*, 69 F. 2d 480 (C.A. 9); *Patchogue-Plymouth Mills Corp.* v. *Durning*, 101 F. 2d 41 (C.A. 2); *Gulbenkian* v. *United States*, 186 Fed. 133 (C.A. 2).

The fact that an impost is attacked on constitutional grounds does not alter the jurisdictional scheme. In *Horton* v. *Humphrey*, 146 F. Supp. 819 (D. D.C.), affirmed, 352 U.S. 921, the plaintiffs, suing in a district court, sought to enjoin the Secretary of the Treasury and his agents from applying a "special dumping duty" imposed by the Anti-Dumping Act of 1921 to certain of their imports. A three-judge court was convened to consider the plaintiff's charges that the Act was repugnant to the Constitution. The three-judge court ruled that, despite the constitutional

issue tendered, the district court was without jurisdiction. It stated (146 F. Supp. at 820):

> The imposition of a duty may under the statutory plan be reviewed by the Customs Court and the Court of Customs and Patent Appeals (with recourse to the Supreme Court through petition for certiorari). This statutory form of review has been held, in comparable situations, to constitute an adequate remedy at law and therefore to bar equitable relief, and to be the exclusive method of review. * * * [cases cited]. The fact that an importer does not need to pay a challenged duty until this method of review is exhausted goes far to sustain the decisions just cited. * * *

Thus, *Horton* v. *Humphrey* unqualifiedly stands for the proposition that any controversy within the jurisdiction of the Customs Court is exclusively relegated to that court. In this case, petitioner admittedly (see J.A. A17, A18) seeks to relitigate in the district court the very controversy which has been decided adversely to other fuel importers by the Court of Customs and Patent Appeals.[5]

Petitioner further argues (Pet. 17–18) that it is entitled to have its constitutional allegations determined by the District Court because the Customs Court is not a constitutional court. Quite apart from the fact that Congress has declared both the Customs

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[5] Petitioner's attempt (Pet. 16) to interpret *Horton* v. *Humphrey* as holding merely that the district court lacked jurisdiction for failure of plaintiff to exhaust his Customs Court remedies is unfounded. The court's decision, as the opinion clearly indicates, was based on the *exclusivity* of the Customs Court procedure, not on any theory of exhaustion.

Court and the Court of Customs and Patent Appeals to be constitutional courts,[9] it is well settled that the presence of constitutional issues does not call for an exception from the exclusiveness of the Customs Court's jurisdiction. *Horton* v. *Humphrey, supra; Morgantown Glassware Guild, Inc.* v. *Humphrey,* 98 App. D.C. 375, 236 F. 2d 670, certiorari denied, 352 U.S. 896; *Cottman Co.* v. *Dailey,* 94 F. 2d 85, 88–89 (C.A. 4); *Riccomini* v. *United States,* 69 F. 2d 480, 483 (C.A. 9). In all events, the fact that this Court may review customs decisions of the Court of Customs and Patent Appeals provides a full answer.

2. Alternatively, petitioner urges (Pet. 8–10) that the single-judge district court was without power to dismiss the complaint. It is petitioner's position that, when an application for a three-judge court is filed, no matter how patently lacking in jurisdiction the district court may be, the dockets of both the district and circuit courts must be disrupted so that a special panel of three judges may be assembled to go through the mere formality of dismissing the complaint. We think that this contention has no substance.

The three-judge court provisions (28 U.S.C. 2282, 2284, infra, pp. 18–19) did not create any new jurisdiction in the district courts, but merely provided a new procedure for dealing with a specified category of cases already within their jurisdiction. Section 2284 applies only in an "action or proceeding *required by Act of Congress* to be heard and determined by a district court of three judges * * *" (*infra,* p. 19)

[9] See 70 Stat. 532; 72 Stat. 848; 28 U.S.C. §§ 211 and 251.

(emphasis added). The single district judge to whom the application for a three-judge court is presented under 28 U.S.C. 2284, *infra*, p. 19, must therefore make at least one threshold determination, as in all other cases: whether the district court has any jurisdiction whatsoever.[7]

Petitioner admits (Pet. 8–10) that, prior to the enactment of 28 U.S.C. 2284(5), *infra*, p. 19, a single district judge was empowered to make these determinations, and was not automatically required to convene a three-judge court. It contends, however, that this practical rule was deliberately abandoned by Congress when it enacted Section 2284(5), which sets forth the composition and procedure for three-judge courts.

We believe, on the contrary, that Section 2284(5) is applicable only *after* a three-judge court has been convened. To facilitate the business of three-judge courts—which in many circuits must be assembled from widely separated courts (see *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U.S. 386, 391; *Phillips* v. *United States*, 312 U.S. 246)—the section authorizes single members of such courts to perform all functions in connection with the proceedings except to conduct the trial, determine appli-

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[7] E.g., *Carrigan* v. *Sunland-Tujunga Telephone Co.*, 263 F. 2d 568 (C.A. 9), certiorari denied, 359 U.S. 975; *Jacobs* v. *Tawes*, 250 F. 2d 611 (C.A. 4).

See also, *California Water Service Co.* v. *Redding*, 304 U.S. 252; *Ex parte Poresky*, 290 U.S. 30, for the view that a single district judge may dismiss the complaint if no substantial constitutional question is presented. Those cases hold substantiality of the constitutional question to be a jurisdictional requirement.

cations for the issuance or vacation of interlocutory injunctions, appoint masters, order references, "or dismiss the action, or enter a summary or final judgment." These provisions serve simply to delimit the powers of the individual members of the three-judge court and have no bearing upon the power of the judge to whom the application for a three-judge court is presented. See, *e.g., Jacobs* v. *Tawes,* 250 F. 2d 611 (C.A. 4); *Carrigan* v. *Sunland-Tujunga Telephone Co.,* 263 F. 2d 568 (C.A. 9), certiorari denied, 359 U.S. 975; *Wicks* v. *Southern Pacific Co.,* 231 F. 2d 130 (C.A. 9), certiorari and motion to file petition for mandamus denied *sub nom. Wicks, et al.* v. *Brotherhood of Maintenance of Way Employees, et al.,* 351 U.S. 946; *Van Buskirk* v. *Wilkinson,* 216 F. 2d 735 (C.A. 9).

In *Jacobs* v. *Tawes, supra,* the Fourth Circuit squarely rejected the contention that, under 28 U.S.C. 2284(5), the single district judge was required automatically to notify the Chief Judge of the Circuit to call in two additional judges. In that case, the plaintiff sought to enjoin certain Maryland officials from assessing taxes which, he alleged, were unconstitutional as applied to him. The district judge, before whom an application for a three-judge court had been filed, dismissed the action on the ground that it did not involve the requisite jurisdictional amount of $3,000. *Jacobs* v. *Tawes,* 151 F. Supp. 770 (D. Md.). Holding that the order of dismissal was "clearly

correct" (250 F. 2d at 613), Chief Judge Parker, for a unanimous court, stated (*id.* at 614):

> * * * [I]t is not required that the [two] additional judges be summoned, when, as here, it appears from the complaint itself that the case is not one within the jurisdiction of the court. Such a case is manifestly not one "required by Act of Congress to be heard and determined by a district court of three judges" within the language of 28 U.S.C. § 2284. As said in *Ex parte Poresky, supra,* "* * * the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction."

Petitioner is forced to the position that *Jacobs* v. *Tawes* and the other above-cited cases, all of which were subsequent to the enactment of the 1942 amendment to the three-judge court provisions, were erroneously decided.[8] Thus, it urges that Congress, in enacting Section 2284(5), intended to overrule *Ex parte Poresky,* 290 U.S. 30, and to prohibit a single district judge, in all circumstances, from dismissing an action where an application for a three-judge court has been made.[9] This construction of Section

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[8] See also *White* v. *Gates,* 253 F. 2d 268 C.A.D.C.; certiorari denied, 356 U.S. 973; *Otten* v. *Baltimore and Ohio R. Co.,* 205 F. 2d 58 (C.A. 2); *Holbrook* v. *Taitano,* 125 F. Supp. 14 (D. Guam).

[9] Petitioner relies principally on an item of legislative history which reveals that one of the bar associations supporting the provision stated that it would overrule *Ex parte Poresky,* and argued that such a result was desirable so as to prevent the single judge from making a preliminary determination of a statute's constitutionality. See H. Rept. No. 1677, 77th Cong., 2d Sess., p. 5 (letter from the Committee on Federal Legislation of the Association of the Bar of the City of New York).

2284(5) was expressly rejected by both the Fourth Circuit in *Jacobs* v. *Tawes, supra,* and the Ninth Circuit in *Carrigan* v. *Sunland-Tujunga Telephone Co.,* 263 F. 2d 568, certiorari denied, 359 U.S. 975, and *Van Buskirk* v. *Wilkinson,* 216 F. 2d 735.[10] As stated in *Jacobs* v. *Tawes* (250 F. 2d 611, 614–615):

> The rule laid down in *Ex parte Poresky, supra,* has not been changed by anything contained in 28 U.S.C. § 2284. That section was enacted to codify and clarify the practice with respect to the composition of and procedure before courts of three judges. Subsection 5 of the section was manifestly intended to regulate procedure after the court of three judges had been constituted, not to abrogate the salutary rule that the judge before whom the action was brought may dismiss it if the complaint does not state a case within the jurisdiction of the District Court.

There is not the slightest indication either in the body of the House Report or in another letter from the Committee on Jurisprudence and Law Reform of the American Bar Association that the provision was designed to overrule any decisions of the Court. On the contrary, the House Report clearly indicates that the real objective of the statute was to define the powers of the individual members of a three-judge court *after* it had convened, in order to allow an individual judge to handle preliminary proceedings provided by the Federal Rules of Civil Procedure, such as depositions and discoveries. See H. Rept. No. 1677, *supra;* 65 A.B.A. Rep. 171. Moreover, even if there were merit to the contention that the provision precluded dismissal by a single judge for want of a substantial constitutional question, the present case is distinguishable since the dismissal here was bottomed solely on the fact that there was no district court jurisdiction whatsoever.

[10] See also Judge Prettyman's opinion (J.A. A4–A14) at 265 F. 2d 593.

The court concluded (250 F. 2d at 615):

> As we have frequently pointed out, statutes should be construed to avoid absurd consequences, as Congress must be presumed not to have intended what was absurd; and it would certainly be absurd to require that, in a case of which the court manifestly lacks jurisdiction, the District Judge must notify the Chief Judge of the Circuit to call in two additional judges, the Chief Judge must call them in and all the cumbersome machinery of a court of three judges must be set in motion merely to dismiss the case. If the single District Judge in dismissing the case for lack of jurisdiction commits error, the error can be corrected by appeal to the Court of Appeals without burdening the Supreme Court with a direct appeal.
>
> Our conclusion is that 28 U.S.C. § 2281 requires a hearing before a District Court of three judges as a prerequisite to the granting of an injunction, not as a prerequisite to dismissing the case when the District Court clearly lacks jurisdiction, and that 28 U.S.C. § 2284(5) forbids dismissal by a single judge only after a court of three judges has been constituted and the procedure applicable to proceedings before the three judges becomes applicable.

There is no substance to petitioner's claim (Pet. 8) that *Snyder's Drug Stores* v. *Taylor*, 227 F. 2d 162 (C.A. 8) and *Aaron* v. *Cooper*, 261 F. 2d 97 (C.A. 8), are inconsistent with *Jacobs* v. *Tawes*. Those cases (unlike *Jacobs* and this case) dealt with situations where a single district judge

had dismissed the complaint for lack of a substantial constitutional question, and not because the subject-matter jurisdiction of the district court did not extend to *that type* of case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1960.

APPENDIX

28 U.S.C. 1256 provides as follows:

§ 1256. Court of Customs and Patent Appeals; certiorari.

Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari.

28 U.S.C. 1340 provides as follows:

§ 1340. Internal revenue; customs duties.

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

28 U.S.C. 1583 provides as follows:

§ 1583. Review of decisions on protests.

The Customs Court shall have exclusive jurisdiction to review on protest the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury; decisions excluding any merchandise from entry or delivery, under any provision of the customs laws; and the liquidation or reliquidation of any entry, or the refusal to pay any claim for drawback or to reliquidate an entry for a clerical error as provided by the customs laws.

28 U.S.C. 2282 provides as follows:

§ 2282. Injunction against enforcement of Federal statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. 2284 in pertinent part provides:

§ 2284. Three-judge district court; composition; procedure.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

* * * * *

(3) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

* * * * *